No. 95-517

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

JOSE M. TOURON,

Petitioner,

v.

METROPOLITAN DADE COUNTY,
JOAQUIN AVINO, County Manager,
ROBERT A. GINSBURG, County Attorney,
CAROL ANDERSON, Asst. County Attorney,
FRED TAYLOR, DONALD MATTHEWS, Major,
VICKI TODARO, Sergeant,
ROBERT OTERO, Lieutenant,
AMERICAN ARBITRATION ASSOC.,
PHILIP PITRUZZELLO, Professor,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

WHETHER A FEDERAL COURT IN A CIVIL RIGHTS ACTION SHOULD GIVE PRECLUSIVE EFFECT TO A JUDGMENT OF A STATE COURT AFFIRMING AN ADMINISTRATIVE DECISION UPHOLDING THE DISCHARGE OF A PUBLIC EMPLOYEE IF THE STATE COURT WOULD GIVE THE JUDGMENT PRECLUSIVE EFFECT.

PARTIES TO THE PROCEEDING

The parties to the proceeding are:

Shelby Highsmith, Judge, U.S. District Court Judge

Stephen T. Brown, Magistrate Judge

Jose M. Touron (Petitioner/Plaintiff, pro se)

Carol Ann Anderson, Esq. (as counsel for Defendants and as defendant)

Joaquin Avino (defendant)

Robert A. Ginsburg, Esq. (defendant)

Donald Matthews (defendant)

Metropolitan Dade County (defendant)

Robert Otero (defendant)

Philip Pitruzzello (defendant)

Fred Taylor (defendant)

Vicki Todaro (defendant)

Jesse Varnell (defendant)

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OPINIONS BELOW

The opinions below are unreported. The district court's opinion is reprinted in the Petitioner's Appendix at pages 3 through 13. The opinion of the Eleventh Circuit Court of Appeals affirming the district court's decision has not been included in the Petitioner's Appendix, but is added as an appendix to this Response. (Respondents' Appendix at 1). The Eleventh Circuit's order denying rehearing and rehearing en banc is included in the Petitioner's Appendix at pages 1-2.

JURISDICTIONAL STATEMENT

The Petition falls within the Court's jurisdiction to review final decisions of the federal courts of appeal by certiorari. 28 U.S.C. § 1254. The lower courts had federal question jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343.

STATEMENT OF THE CASE

The only issue raised by this Petition is whether the lower courts properly concluded that this § 1983 action is precluded by a state court judgment affirming an administrative decision upholding the Petitioner's discharge from public employment. Because the issue is so narrow, the relevant facts can be stated much more succinctly than they are in the Petition.

The Petitioner, Jose Touron (hereinafter, Touron), was employed by the Respondent, Metropolitan Dade County

(hereinafter, the County), as a police officer. (Petitioner's Appendix at 36) (hereinafter, Pet. App. at ___). He was discharged for informing a suspect that he was under investigation for dealing narcotics and then telling the suspect not to identify him as the source of the information. (Pet. App. at 39). As a permanent civil service employee, Touron had the right to appeal his discharge to an independent hearing examiner under § 2-47 of the Metropolitan Dade County Code, the provisions of which are incorporated into a collective bargaining agreement between the County and the Dade County Police Benevolent Association, the union that represents all County police officers. (Pet. App. at 16-17, 25-30).

In accordance with the Code, a hearing examiner was appointed by the American Arbitration Association (AAA). (Pet. App. at 4). Although hearing examiners are supplied by the AAA, they do not actually serve as arbitrators. *Id.* Instead their authority is limited to making "findings of facts, conclusions and any recommendations" and transmitting them to the County Manager, "who may sustain, reverse or modify the . . . dismissal." (Pet. App. at 17).

At the appeal hearing, Touron was represented by counsel, and was given the opportunity to conduct discovery, submit evidence, call and cross-examine witnesses, and offer argument. (Pet. App. at 4-5). Upon completion of the hearing, which lasted six days, the hearing examiner issued a written report concluding that Touron had committed the acts alleged and recommending that his request for reinstatement, back pay and benefits be denied. (Pet. App. at 52-55). He suggested,

however, that the County consider offering Touron reemployment as a probationary police officer if he was willing to acknowledge the mistakes he had made. *Id.* The County Manager accepted the hearing examiner's findings and recommendations that Touron not be reinstated, but rejected the suggestion that he be offered a chance at reemployment. (Pet. App. at 56-57).

Touron appealed the Manager's decision, pursuant to § 2-47.1 of the Dade County Code, to the Appellate Division of the Circuit Court of the Eleventh Judicial Circuit of Florida. (Pet. App. at 14). On appeal, Touron argued that his discharge should be set aside because he was denied due process under the United States Constitution, was not afforded sufficient opportunity to cross-examine and challenge evidence presented against him, and for other reasons identical to those presented in the complaint in this action. (Pet. App. at 6). A three-judge panel of the state Circuit Court affirmed the County Manager's decision. (Pet. App. at 14).

Touron then filed the Complaint in this action. The Complaint alleges that the County and a variety of County officials violated 42 U.S.C. § 1983 by denying Touron his constitutional rights to due process and equal protection in connection with his discharge. (Pet. App. at 6). The district court granted summary judgment on the basis of res judicata and the Eleventh Circuit Court of Appeals affirmed per curiam. (Resp. App. at 1). The Eleventh Circuit denied Touron's motion for rehearing or rehearing en banc. (Pet. App. at 1).

REASONS FOR DENYING THE WRIT

There are at least three reasons for denying this Petition for Writ of Certiorari. First, the Petitioner has misrepresented the material facts by suggesting that the lower courts have held that this action is precluded by an unreviewed arbitration decision. In fact the judgment upon which the lower courts relied to preclude this action is a state court judgment which affirmed an administrative decision. Second, this Court has already held that federal civil rights actions can be precluded by state court judgments affirming administrative decisions, similar to the one entered in this case, in accordance with the Full Faith and Credit Statute, 28 U.S.C. § 1738. Third, this Court's previous decisions have not left any conflict among the lower courts: every appellate court that has considered the matter in the last fifteen years has agreed that a state court judgment affirming an administrative decision precludes a federal action to the same extent as the judgment would preclude an action in state court.

I. THE PETITION MISREPRESENTS THE NATURE OF THE STATE COURT JUDGMENT UPON WHICH THE LOWER COURTS RELIED TO CONCLUDE THAT THIS ACTION IS BARRED BY RES JUDICATA

Throughout the Petition, Touron refers to the civil service decision and state court judgment affirming that decision as a "arbitration award". From this erroneous statement, he argues that the lower courts failed to follow this Court's holdings in such cases as *McDonald v. City of West Branch*, 466 U.S. 284, 104 S. Ct. 1799, 80 L. Ed. 2d 302

(1984) and *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 101 S. Ct. 1437, 67 L. Ed. 2d 641 (1981), that an arbitration decision does not preclude a subsequent federal statutory claim for discrimination. *See also, Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 S. Ct. 1011, 39 L. Ed. 2d 147 (1974).

This case, however, does not involve an arbitration decision and is therefore not governed by this Court's previous decisions concerning the effect of an arbitration award on a subsequent federal statutory claim. The decision which the lower courts have held precludes this action is not an arbitration award but a state court judgment affirming an administrative proceeding. As the district court explained, "it is important to note that the role of the American Arbitration Association was only in the appointment of a hearing examiner, and the hearing was conducted pursuant to applicable sections of the County Code." (Pet. App. at 4). In accordance with the Dade County Code, the hearing examiner acted in the role of a factfinder, making a recommendation to the County Manager, not as a final and binding arbitrator. Dade County Code § 2-47 (Pet. App. at 16-17). The hearing examiner's recommendation and the Manager's final decision were subject to direct review in state court, in accordance with Dade County Code § 2-47.1 (Pet. App. at 18-19). It is the state court's order affirming the Manager's decision, and not the hearing examiner's recommendation or even the Manager's final decision, that constitutes the judgment

that precludes this action under the doctrine of res judicata.[1]

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[1] Touron's suggestion that the state appellate court's review was by discretionary certiorari is simply incorrect. Under the County Code, review of the Manager's decision in disciplinary matters is a matter of right. *Code of Metropolitan Dade County* § 2-47.1 (Pet. App. at 18-19). Touron's reliance upon a variety of cases holding that a denial of certiorari does not constitute a judgment for purposes of res judicata is therefore entirely misplaced. Although appellate review of administrative decisions in Florida has occasionally been referred to as review by certiorari, the Florida Supreme Court has long recognized that when the review is made available as a matter of right, it is not "truly discretionary common-law certiorari." *Haines City Community Develop. v. Heggs*,___ So. 2d ___, 20 Fla. L.W. 318, 1995 WL 392859 (Fla. July 6, 1995). *See City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982) (if the appeal is a matter of right, judicial review of a civil service decision is effectively an appeal regardless of whether it is labeled as a petition for certiorari). The Florida courts have also long held that administrative decisions, especially when affirmed by a state court, are entitled to full res judicata effect. *See, e.g., United States Fidelity & Guaranty Co.*, 444 So. 2d 78, 80 (Fla. 5th DCA 1984) ("Where an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it, as to which the parties have had an adequate opportunity to litigate, the court will apply res judicata or collateral estoppel to enforce repose."); *Carol City Utilities v. Miami Gardens Shopping Plaza*, 165 So. 2d 199 (Fla. 3rd DCA 1964) ("The doctrine of estoppel by judgment applies to administrative findings which are of a quasi-judicial nature, particularly when judicial review of these findings has been exhausted."). This issue of Florida law is not properly a matter for this Court to decide in any event.

II. THIS COURT HAS ALREADY RESOLVED THE ISSUE OF WHETHER A FEDERAL COURT IN A CIVIL RIGHTS ACTION SHOULD GIVE PRECLUSIVE EFFECT TO A DECISION OF A STATE COURT AFFIRMING AN ADMINISTRATIVE DECISION.

In *Allen v. McCurry*, 449 U.S. 90, 101 S. Ct. 411, 66 L. Ed. 2d 308 (1980), this Court held that the Full Faith and Credit Statute, 28 U.S.C. § 1738, requires federal courts to give a state court judgment the same preclusive effect in a civil rights action as a state court would give to that judgment under the law of the state in which the judgment was rendered. In *Migra v. Warren City School District Board of Education*, 465 U.S. 75, 104 S. Ct. 892, 79 L. Ed. 2d 56 (1984), the Court considered an issue left open by *Allen*, whether the preclusive effect of a state court judgment applies "to a federal issue that a § 1983 litigant could have raised but did not raise in the earlier state court proceeding." *Id.* at 83, 104 S. Ct. at 892. The Court held that § 1983 "does not override state preclusion law" and therefore that a "state-court judgment . . . has the same preclusive effect in federal court that the judgment would have in" the courts of the state where the judgment was first rendered. *Id.* at 85, 104 S. Ct. at 898.

In *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 102 S. Ct. 1883, 72 L. Ed. 2d 262 (1982), the Court considered the application of res judicata to a state court judgment that affirmed an administrative decision. The Court held that the Full Faith and Credit Statute, 28 U.S.C. § 1738, requires federal courts to give preclusive effect to a decision of a state court upholding a state administrative agency's rejection of an employment discrimination

claim if the state court's decision would be res judicata in the state's own courts. 456 U.S. at 463, 102 S. Ct. at 1888. The Court distinguished cases such as *Alexander v. Gardner-Denver* which dealt only with an arbitration award:

> The holding in *Gardner-Denver* was that a private arbitration decision concerning an employment discrimination claim did not bind the federal courts. Arbitration decisions, of course, are not subject to the mandate of § 1738.

456 U.S. at 477, 102 S. Ct. at 1895.

The Courts' subsequent decisions have not varied from the holdings of *Allen*, *Migra* and *Kremer*. In *University of Tennessee v. Elliot*, 478 U.S. 788, 106 S. Ct. 3220, 92 L. Ed. 2d 635 (1986), for example, the Court held that "when a state agency acting in a judicial capacity . . . resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate . . . the federal courts must give the agency's factfinding the same preclusive effect to which it would be entitled in the state's courts." *Id.* at 799, 106 S. Ct. at 3226. *Compare Astoria Federal Savings & Loan Ass'n v. Solimino*, 501 U.S. 104, 111 S. Ct. 2166, 115 L. Ed. 2d 96 (1991) (*unreviewed* state administrative decision did not preclude claim under the Age Discrimination in Employment Act).

The lower courts in this action did nothing more than follow this Court's well-established precedent. As the district court explained, while it is true that private arbitration decisions do not preclude subsequent federal actions, this case does not involve an arbitration but an administrative proceeding affirmed by subsequent state

court review. (Pet. App. at 11). It is the state court judgment that serves as the basis for concluding that this action is barred by res judicata.

III. THERE IS NO CONFLICT AMONG THE LOWER COURTS AS TO WHETHER AN ADMINISTRATIVE DECISION AFFIRMED BY A STATE COURT CAN PRECLUDE A SUBSEQUENT CIVIL RIGHTS CLAIM

Touron's suggestion that the Court should accept certiorari to resolve a conflict amongst the circuits as to whether an arbitration decision can preclude a subsequent federal action is, like all of his other arguments, based on the erroneous assumption that the lower courts relied on an arbitration decision to conclude that this action is precluded. Once it is understood that the decision that precludes this action is a state court judgment which affirmed an administrative decision, the alleged conflict disappears. Every circuit court of appeals that has considered the issue has held, as the lower courts did in this case, that a state court judgment affirming a civil service decision can preclude a subsequent civil rights claim. *See, e.g., Swineford v. Snyder County, Pa.*, 15 F.3d 1258, 1266 (3rd Cir. 1994) ("[W]hen adjudicating Reconstruction Civil Rights laws, federal courts must give the same preclusive effect to state agency findings as would the state courts when the agency, acting in a judicial capacity, resolves disputed issues of fact."); *Edmundson v. Borough of Kennett Square*, 4 F.3d 186, 189 (3rd Cir. 1993) ("Decisions of state administrative agencies that have been reviewed by state courts are . . . given preclusive effect in federal courts."); *Osborn v. Ashland County Board*

of Alcohol, Drug Addiction & Mental Health Services, 979 F.2d 1131, 1133 (6th Cir. 1992) (state court's review of administrative decision upholding the plaintiff's discharge precluded subsequent § 1983 action for violation of due process); *Sanchez v. City of Santa Ana*, 936 F.2d 1027, 1035-36 (9th Cir. 1990), *cert. denied*, 502 U.S. 957, 112 S. Ct. 417, 116 L. Ed. 2d 437 (1991) (federal constitutional claims precluded by state court appellate judgment affirming personnel board's decision upholding police officer's termination); *Welch v. Johnson*, 907 F.2d 714 (7th Cir. 1990) (section 1983 and Title VII claims barred by state court judgment affirming civil service commission decision upholding employee's discharge); *Nichols v. City of St. Louis*, 837 F.2d 833 (8th Cir. 1988) (state court judgment affirming civil service commission's decision upholding public employee's discharge precluded federal action for age discrimination); *Bolling v. City and County of Denver*, 790 F.2d 67 (10th Cir. 1986) (state court judgment affirming civil service board's decision upholding public employee's discharge precluded federal civil rights claims); *Sharpley v. Davis*, 786 F.2d 1109 (11th Cir. 1986) (state court judgment affirming board of education's decision to discharge employee barred any federal constitutional claim which was raised or could have been raised in the state proceeding); *Lee v. City of Peoria*, 685 F.2d 196 (7th Cir. 1982) (state court judgment affirming board of police commissioner's decision to discharge police officer barred any subsequent federal claim that was brought or could have been brought in the state court proceeding).

CONCLUSION

The Court should deny the Petition for Writ of Certiorari because it raises an issue that is neither new nor controversial. The lower courts did nothing more than follow this Court's well-established precedent, holding that a federal civil rights claim can be precluded by a state court judgment affirming an administrative decision to the same extent that such a claim would be precluded in state court. Accordingly, the Respondents respectfully urge the Court to deny the Petition for Certiorari.

Respectfully submitted,

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